JUN 1 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

NO. 75-1745

RAYMOND EDWARD BARBOUR,

Petitioner

V.

STATE OF NORTH CAROLINA,

Respondent

****

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND THE COURT OF APPEALS OF NORTH CAROLINA.

****

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STATUTE

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Petitioner, Raymond Edward Barbour prays that the writs of certiorari be issued to review the judgment and order of the Supreme Court of North Carolina, which was filed in this proceeding on March 2, 1976, denying the Petitioner's petition to the Supreme Court of North Carolina for writ of certiorari, and to review the opinion and judgment of the Court of Appeals of North

Carolina, which latter opinion and judgment was filed on January 7, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals of North Carolina is reported at 28 N.C. App. 259, 220 S.E.2d 812 (1976) and is reproduced in Appendix B. The denial by the Supreme Court of North Carolina of certiorari in this cause is reported at ___N.C._____, 223 S.E.2d 160 (1976), and is reproduced in Appendix A.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on March 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

Whether it is constitutionally permissible under the Fifth and Fourtennth Amendments to the Constitution of the United States:

A. For the trial court in a murder case to shift the burden of proof to the defendant to

prove, in order to receive the lesser penalty prescribed for manslaughter, that there was no malice on his part?

B. For the trial court of deny defendant's motion for mistrial for the prejudice done to him in a felonious homicide case when the private prosecutor removed the bloody shirt of the deceased from a bag and such a foul odor emerged in the courtroom that the shirt was put back into the bag and not formally introduced, but the damage was already done in that the jury had smelled the odor?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this petition for writ of certiorari is the Fifth Amendment to the United States Constitution in so far as it imbodies fundamental rights guaranteed by the Fourteenth Amendment to the United States Constitution. These provisions are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner, Raymond Edward Barbour, was

convicted in the Superior Court of Alamance Court, North Carolina, for the second-degree murder of William Samuel Abner (Abner).

On June 13, 1974, during the day, Petitioner had a conversation with Abner, which made Petitioner believe that Abner was going to sell him some drugs that evening. Petitioner called William F. Miles, the Chief of Police of Graham, North Carolina, informing the Chief about the expected drug transaction to be made later that evening which was probably going to involve "a big quantity of drugs". [R. 115, 136, 137]. The Chief requested that the defendant get at least a sample of the drugs if he could. Prior to this occasion, the Chief had given Petitioner a letter [R. 129] authorizing him to act as an undercover police officer and permission to carry a .38 caliber hand gun. [R. 109, 110, 136].

Abner and a man by the name of J. B. McDonald arrived at Petitioner's house the evening of June 13th, picked up Petitioner, and after going

to a local steak house which was closed, they went to Zack's, a hot dog establishment in nearby Burlington. Abner went inside, then returned and ordered McDonald to go inside and have a hot dog, and McDonald went inside. [R. 115-122].

Then Abner walked around to the front door of the automobile in which the defendant was sitting and displayed a quantity of pills to Petitioner. The defendant attempted to grab some of the pills, but Abner snatched the bottle away before he was able to grab any more than two or three, Abner pushed Petitioner away and said "Let's go in and get a hot dog."

Petitioner then told Abner that he was under arrest and Abner laughed at the Petitioner. Abner then turned and walked toward Zack's. Petitioner called for Abner to stop three times, byt Abner continued to walk towards Zack's, turning back only to make a gesture with his hands. At this point, Petitioner took a pistol

from his pocket, unholstered it, cocked it and prepared to fire a warning shot in the air. As he moved to avoid firing into an overhanging awning, the defendant slipped and his hands struck the open door of the automobile and the gun discharged. Abner kept on walking into Zack's and Petitioner remained next to the automobile believing that in that position he could control the entrance to Zack's if Abner came outside before the police arrived.

McDonald left the scene. [R. 50].

Upon the arrival of the police, Petitioner complied with their orders to surrender the gun and gave arriving officers the letter from Chief Miles authorizing him to carry the gun and act as an undercover agent. Petitioner also informed the police about the pills which he had seen in the possession of Abner.

Petitioner offered testimony which tended to show that he did not intend to kill Abner, that he had only produced the pistol when Abner

refused to stop after being placed under arrest, and that he believed that he was acting in the capacity of a police officer in making the arrest and the order to stop.

Petitioner offered further evidence which tended to show that a local cab driver picked up McDonald near Zack's on the night of June 13, 1974, carried McDonald to a type of produce stand where McDonald made a purchase, and then carried McDonald home. The cab driver testified that when McDonald got out at his home, that he not only had a bag which he got from the produce stand, but he also had another bag with him.

REASONS FOR GRANTING THE WRITS

A. WRITS SHOULD BE ISSUED TO DETERMINE WHETHER IT WAS ERROR FOR THE TRIAL COURT IN THIS MURDER CASE TO SHIFT THE BURDEN OF PROOF TO THE DEFENDANT TO PROVE THAT THERE WAS NO MALICE ON HIS PART IN ORDER TO RECEIVE THE LESSER PENALTY OF MANSLAUGHTER.

In Mullany v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508 (filed 9 June 1975), from

Maine, this Court applied, in re Winship, 397 U.S. 358, 364, 24 L.Ed. 2d 368, 90 S.Ct. 1068 (1970), which set out the due process requirement that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. Although Maine had concluded differently, Winship was given complete retroactive effect in Ivan v. New York, 407 U.S. 203, 32 L.Ed. 2d 659, 92 S.Ct. 1951 (1972).

In the instant case, the trial court shifted the burden of proof to Petitioner to prove, in order to receive the lesser penalty prescribed for manslaughter, that there was no malice on his part [Appendix G, p.2la,R. 176, 177]. Your Petitioner submits that the shifting of the burden of proof to him on this issue violates his Fifth and Fourteenth Amendment Rights under the U.S. Constitution and that Mullaney should be applied retroactively to his case, since there is already

a split among the states on this important issue. Maryland has held Mullaney to be retroactive in Evans v. State, 28 Md. A. 640, 349 A 2d 300, 18 Cr. L. 2353 (filed 25 November 1975); but North Carolina has held Mullaney not to be retroactive in State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (filed 15 December 1975) and that it does not apply to the presumption of malice, State v. Williams, 288 N.C. 680, 220 S.E.2d 558.

Petitioner sees no reason why Mullaney should be treated any differently than Winship on this point, since Mullaney appears to be an extension of Winship, and Petitioner sees no reason why a defendant's rights should vary from state to state on this point, since it appears to be an important question for this Court to decide.

Your Petitioner was sentenced to 35-40 years for murder in the second degree on January 12, 1975, and the North Carolina Court of Appeals

affirmed same on January 7, 1976. Mullaney was decided by this Court of June 9, 1975. The importance of the "retroactivity" issue seems self-evident, since capital offenses involving the highest criminal penalties are the ones that are involved. In what other criminal cases could the effect of prejudice be greater than here? And, had Petitioner been tried in Maryland under the Evans rationale, rather than in North Carolina, he contends that his case would have been reversed for a new trial on the grounds that Mullaney is retroactive and that Mullaney would apply to his case.

Using the rationale of Evans v. State, supra, the Court should find that there was an erroneous allocation of the burden of persuasion on the questions of mitigation, justification, or excuse, (the issues of (1) Petitioner's state of mind that he was acting as a police officer, (2) Petitioner's intent only to fire a warning shot, and (3) Petitioner's belief in his right

to make a citizen's arrest, being fairly in the case) and where Petitioner was tried for first degree murder and the verdict was for second degree murder; therefore, this case would be reversed.

B. WHETHER THE INJECTION BY THE PROSECUTOR IN THE PRESENCE OF THE JURY OF THE FOUL ODOR FROM THE BLOODY SHIRT OF THE DECEASED IN A FELONIOUS HOMICIDE CASE IS PREJUDICIAL ERROR WHEN THE SHIRT ITSELF WAS NOT INTRODUCED INTO EVIDENCE.

The writs should be granted to determined whether an odor, in this case the odor from the deceased's bloody shirt in a first degree murder trial, is likely to prejudice defendant's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution, which rights are also preserved under Article I, Section 19 of the North Carolina Constitution, [Appendix D, p.15a].

Near the end of this trial, the private prosecutor pulled the bloody shirt of the deceased out of a plastic bag and had it identified by Otis Christopher, State's Rebuttal witness. [Appen-

dix F, p. 17a , R. 150, 151]. A foul odor came from the shirt and bag and was smelled by the jury, such that the shirt was put back into the bag and never tendered or introduced into evidence by the State. Your petitioner submits that he was prejudiced in a manner both outré and irreversible at this stage, and his trial counsel argued the point vigorously in a mistrial motion. [R. 155, 156, Appendix F].

The cause of the odor is to this day unknown by Petitioner, but its existence is verified by the record [R. 150, 151], and tacitly by the State, whose officers sprayed the shirt with a disinfectant [R. 156], and Petitioner's efforts to discover the cause and nature of the odor to determine whether foul play by the State had caused same was frustrated by the Trial Judge who refused to allow examination of the shirt [R. 156]. The traditional methods of presenting errors on appeal are inadequate for setting out the actual odor or a

description of that odor, and its effect on the jury at the conclusion of this murder case, but your Petitioner submits that he was prejudiced in a very real manner by this odor.

Either the private prosecutor knew, or he should have known of the stench attached to his exhibit #25. Once the odor was out of the bag, it was not possible to put it back into the bag with the shirt.

Further, the Trial Judge abused his discretion in denying Petitioner's mistrial motions concerning the odor, and there was no effective way to cure this prejudice, once the odor was before the jury. See 74 Am Jur 2d, Trial, Sec. 198, p. 283.

CONCLUSION

For the foregoing reasons, the Petitioner requests that his petition for writs of certiorari be granted.

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APPENDIX A

No. 14PC FIFTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1976

STATE OF NORTH CAROLINA

V.

RAYMOND EDWARD BARBOUR

Judgment Dismissing Appeal And Order Denying Petition For Discretionary Review

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendant and upon defendant's petition for discretionary review under G.S. 7A-31 to the North Carolina Court of Appeals; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; that the petition for discretionary review be denied, and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

the order for stay of execution of the judgment heretofore entered is hereby dissolved.

And it is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 ($9.00) DOLLARS and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this 2nd day of March, 1976.

Adrian J. Newton
Clerk of the Supreme Court
of North Carolina

By: John R. Morgan
(Seal) Assistant Clerk

cc: Felix B. Clayton, Attorney at Law
Thomas B. Wood, Assistant Attorney General
Herbert F. Pierce, District Attorney

APPENDIX B

NO. 7515SC479

NORTH CAROLINA COURT OF APPEALS

Filed: 7 January 1976

STATE OF NORTH CAROLINA

V.

RAYMOND EDWARD BARBOUR

Alamance County
No. 74CRS7772

Appeal by defendant from Tillery, Judge. Judgment entered 12 January 1975 in Superior Court, Alamance County. Heard in the Court of Appeals 24 September 1975.

In a bill of indictment proper in form, defendant was charged with the murder of William Samuel Abner (Abner) on 13 June 1974. He was placed on trial for murder in the first degree and pled not guilty.

Evidence presented by the State is summarized in pertinent part as follows:

Defendant and Abner were friends and business associates. On the night in question, Abner and J. B. McDonald went to defendant's home. After a brief stay, the three of them, in a car driven by Abner, went to a steak house, located some nine or ten miles from defendant's home. Finding the steak house closed, they drove to Burlington to get something to eat and parked the car on the street near Zack's Restaurant. During the time they had been together, the three had consumed various quantities of intoxicants. Abner got out of the car and went into the restaurant, leaving defendant and McDonald in the car. Defendant produced a .38 caliber pistol, placed the barrel to McDonald's head, and stated, "I am going to kill you." After a brief conversation, defendant instructed McDonald to lie down in the back seat of the car, which he did. Abner returned to the car and, while he and defendant were engaged in a conversation, McDonald slipped

out of the car and went into the restaurant. Abner left the car again and started walking back toward the restaurant. Defendant got out of the car, told Abner to stop, and asked if he was coming back. Abner continued walking toward the restaurant, whereupon defendant took aim with his pistol and shot Abner in his back. Abner staggered on into the restaurant where he died a few minutes later from gunshot wounds.

Evidence presented by defendant is summarized in pertinent part as follows:

Although defendant and Abner had been friends for several years, defendant began to suspect that Abner was involved in the drug traffic. Defendant had been given a letter from the Chief of Police of Graham, N.C., authorizing him to carry a weapon and to act as an undercover police officer. Prior to seeing Abner that night, defendant had attempted to arrange a drug transaction with Abner with the view of consummating the transaction and

arresting Abner. When they went to the restaurant in Burlington, defendant thought Abner had drugs in his possession. After Abner first went into the restaurant and returned to the car, he displayed a quantity of pills to defendant. Defendant tried to grab the pills but Abner jerked the bottle away and invited defendant to accompany him into the restaurant to get a hot dog. At that point, defendant told Abner that he was under arrest. Abner laughed, turned, and started walking toward the restaurant. Defendant told Abner to stop but he continued to walk on toward the restaurant. Whereupon, defendant took his pistol from his pocket, cocked it, and prepared to fire a warning shot into the air. As defendant moved to avoid firing into an overhanging awning, he slipped, his hands struck the open door of the automobile, and the gun accidentally discharged.

The jury found defendant guilty of murder in the second degree and from judgment imposing prison sentence of not less than 35 nor more than 40 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Fred Darlington, III, Felix B. Clayton and Thomas B. Anderson, Jr., for defendant appellant.

BRITT, Judge. Defendant assigns as error the denial of his timely made motions to dismiss all charges, particularly his motion to dismiss as to first-degree murder. The assignments have no merit.

Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation. State v. Moore, 275 N.C. 198, 166 S.E. 2d 652 (1969). When the State satisfies the jury beyond a reasonable doubt that the defendant intentionally shot the deceased with a pistol, thereby proximately

causing his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice, constitution the offense of murder in the second degree. State v. Propst, 274 N.C. 62, 161 S.E. 2d 560 (1968). While the State must prove premeditation and deliberation, ordinarily it is not possible to prove these elements directly. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are want of provocation on the part of the deceased, the conduct of defendant before and after the killing, and the use of grossly excessive force. State v. Britt, 285 N.C. 256, 204 S.E. 2d 817 (1974). No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of first-degree murder. State v. Perry, 276 N.C. 339, 172 S.E. 2d 541 (1970).

Clearly, the evidence presented by the State was sufficient to show defendant intention-

ally shot Abner with a pistol, and that within minutes died from wounds inflicted by the bullet, thereby raising the presumptions that the killing was unlawful and with malice. We think the showing of want of provocation on the part of Abner, the conduct of defendant before the shooting and particularly his threat to kill McDonald and his taking careful aim at Abner, together with the use of grossly excessive force, warranted the trial court in submitting the case on first-degree murder.

Defendant assigns as error the failure of the court to grant his motion for a mistrial when the prosecuting attorney, in close proximity to the jury, removed from a plastic bag a foul smelling bloody shirt allegedly worn by Abner at the time he was shot. This assignment has no merit. To allow the motion was within the sound discretion of the trial judge. We perceive no abuse of this discretion. 3 Strong, N.C. Index 2d, Criminal Law §128.

Defendant assigns as error the failure of the court to instruct the jury as requested by him on the law with respect to citizen's arrest and on the law arising from defendant's evidence that he believed he was acting as a law enforcement officer. These assignments have no merit.

At the time of the alleged offense, the following statute, former G.S. 15-40, which has been repealed, was in effect: "Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense . . ." Defendant argues that the statute gave him the right as a citizen to arrest Abner whom he had reasonable ground to believe was committing a felony - possessing narcotic drugs - and that it was a question for the jury whether defendant acted reasonably. We reject this argument.

In State v. Mobley, 240 N.C. 476, 481, 83 S.E. 2d 100, 103 (1954), we find:

"G.S. 15-40 (Subchapter 1, Section 6 of the Act of 1869) authorizes private presons to make arrests in certain felony cases. By the terms of this statute, when a felony actually has been committed in the presence of a private person, he may forthwith arrest without warrant (1) the person he knows to be guilty, or (2) the person he has reasonable ground to believe to be guilty. It is noted that this statute confers on a private citizen the right of arrest only when a felony is actually committed in his presence. Thus, if it turns out that the supposed offense is not a felony, then the arresting private citizen may not under the terms of the statute justify taking the suspect into custody. . . ."

For defendant to have had the protection of the above quoted statute, he had to show that Abner actually committed a felony in his presence, not merely that he had reasonable ground to believe Abner was committing a felony. This defendant failed to show.

Defendant's contention that he believed he was acting as a police officer is not persuasive. Assuming, arguendo, that the letter from the Chief of Police of the Town of Graham provided defendant with reason to believe he had authority to act as a police officer in that town, he had

no reason to believe that his authority would extend to the City of Burlington. See Martin v. Houck, 141 N.C. 317, 54 S.E. 291 (1906); State v. Cam]bell, 107 N.C. 948, 12 S.E. 441 (1890).

Defendant assigns as errors portions of the jury charge relating to presumptions of malice arising from a showing of intentional use of a deadly weapon and death resulting therefrom. By Exception 139, he excepts to instructions shifting the burden to defendant to show no malice after the State had shown intentional shooting with a pistol and death resulting therefrom. We find no merit in these assignments unless the instructions challenged by Exception 139 are invalid under Mullaney v. Wilbur, 421 U.S. 684, L.Ed. 2d 508 (filed 9 June 1975).

In State v. Williams, _____N.C._____, ____ S.E. 2d _____ (filed 17 December 1975), our State Supreme Court held that the ruling in Mullaney does not apply to the presumption of

malice that arises when the State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death. See also, State v. Hankerson, ____N.C.___,_____S.E. 2d____,(filed 17 December 1975), holding that Mullaney will not be given retroactive effect in North Carolina and will apply only to trials conducted on or after 9 June 1975.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief and find them likewise to be without merit.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

A True Copy
Theodore C. Brown, Jr.
Clerk of the Court of Appeals
of North Carolina
By: Hazel J. Hart
Deputy Clerk
January 8, 1976

APPENDIX C

Excerpted Amendments to the Constitution of the United States

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

Excerpted Amendment to the Constitution of North Carolina

ARTICLE I

Section 19. Law of the land; equal protection of the laws. No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to

discrimination by the State because of race, color, religion, or national origin.

APPENDIX E

Excerpted Section from the
North Carolina General Statutes
(in effect June 13, 1974)

§15-40. Arrest for felony, without warrant. - Every person in whose presence a felony has been committed may arrest the person whom he knows has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of the police, upon information, to assist in such arrest. (1868-9, c. 178, subc. 1, s.6; Code, s. 1129; Rev.,s. 3177; C.S.,s. 4543.)

APPENDIX F

Excerpted Portion of the Trial
From the Printed Record Before the
North Carolina Court of Appeals

STATE IN REBUTTAL

OTIS CHRISTOPHER testified on DIRECT EXAMINATION by Mr. Dodge.

* * * * *

R. 150 I recognize State's Exhibit #25. It resembles the shirt Mr. Abner had on on this night.

I was subpoenaed in this action by the defendant.

(At this point, the bloody shirt was taken from a plastic sealed wrapper and a foul odor came from the shirt and the bag. The witness, jurors, District Attorney, and attorney for defendant all smelled the odor.

R. 151 MR. DODGE: Take the shirt.

(Harold Dodge put the shirt back into the plastic bag and give it back to Lt. McCauley.)

EXCEPTION #119

(The shirt was never introduced into evidence by the State.)

* * * * *

R. 155 THE FOLLOWING TRANSPIRED IN CHAMBERS OUT OF THE PRESENCE OF THE JURY:

(MR. ALLEN: The first motion is that all charges be dismissed at the close of evidence. COURT: Denied.) EXCEPTION #121

(MR. ALLEN: That the charge of Murder in the First Degree be dismissed at the close of all evidence.

COURT: Denied.) EXCEPTION #122.

(MR. ALLEN: The motion we make, Your Honor, we feel the Court can and should take judicial notice and we ask at the close of stating the motion the Court make a finding as to its judicial notice and let the record show, the matter pertains to a mistrial on the grounds that irretrievable and irreversible prejudice was done to the defendant in the shirt

that was removed from the bag and shown to the jury and smelled by the jury. We would state that one newspaper account this morning, one portion of the Durham Herald account stated as follows: "Christopher and the stenographer sitting near him nearly gagged as Harold Dodge, private prosecutor, held out the shirt for their inspection. In the opposite side of the courtroom, observers and witnesses also gagged after the smell of the foul odor of stale blood in the shirt. The Burlington and Greensboro papers likewise referred to the odors as pungent.

R. 156 In its introduction in a death case, a capital case, of the odor of death, odor of the deceased body, so the jury would be included to identify it and it would have an adverse consequence to the defendant in the eyes of the jury.) EXCEPTION #123

(Argument to the Court.)

(MR. ALLEN: In addition to the motion for

mistrial, and whether or not our motion for mistrial is granted, we move the Court that the officers be directed to give this exhibit to the High Sheriff of Alamance County to deliver to the medical examiner for what substance other than blood that may have accounted for the smell.)

EXCEPTION #124

(In further - - for further grounds for the motion, we say to the Court we are advised this morning by Lt. McCauley and Sgt. Hoggard that this evidence was tampered with last night without leave of the Court. We are informed by these officers who heard the State rest and who had no way of knowing or presumed to know that there would be no further display of this shirt, without leave of the Court or anyone they took the shirt out and sprayed with a disinfectant and we say this was prejudicial. That is the motion.) EXCEPTION #125.

(COURT: Having been as close to the shirt as anybody except the court reporter and

the witness, I do not consider this sufficient for a mistrial of the case and the motions and each of them are denied.) EXCEPTION #126.

APPENDIX G

Excerpted Portion of the Trial Judges Charge to the Jury from the Printed Record Before the North Carolina Court of Appeals.

* * * * *

R. 176 I have already defined malice.

(If the State proves beyond a reasonable doubt that the defendant intentionally killed William Abner with a deadly weapon, or intentionally inflicted a wound upon William Abner with a deadly weapon which proximately caused his death, the law raises two presumptions: first, that the killing was unlawful, and, second, that it was done with malice.)

EXCEPTION #138

Now, second-degree murder differs from first-degree murder in that neither the specific intent to kill nor the premeditation, nor the delibera-

tion, is necessary. In order for you to find the defendant guilty of second-degree murder the State must prove beyond a reasonable doubt that the defendant intentionally shot William Abner with a deadly weapon thereby proximately causing his death.

R. 177. Then, nothing else appearing, the defendant would be guilty of second-degree murder.

Now, in order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt but simply to your satisfaction, that there was no malice on his part. To negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:

First, that he shot Willam Abner in the heat of passion. Now, this doesn't mean mere anger; it means that the defendant's state of mind was at the time so violent as to overcome his reason, so much so that he could not think

to the extent necessary to form the intent necessary to form the deliberate purpose and control his actions;

Second, he must satisfy you that this passion was produced by some action on the part of William Abner which the law regards as adequate provocation. That would consist of anything which has a natural tendency to produce such passion or frame of mind in a person of average mind and disposition;

Third, he must satisfy you that the shooting took place so soon after the provocation, whatever you may find that may be, that the passion of a person of average mind and disposition would not have cooled.) EXCEPTION #139.